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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1227

ROBERT L. STRAUSS,
Petitioner

v.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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INDEX TO BRIEF

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement	4

Reasons Why The Writ Should Be Denied:

I. The Facts in This Case are Clearly Distinguishable in Several Ways from Those in *Whitus v. Georgia,* 385 U.S. 545, and Cases Following *Whitus*	6
II. The State did not Wilfully Inject any Racial Issue into the Jury Trial as Asserted by Petitioner	14
III. The Application of *Whitus* Retroactively to Collateral Attack in this Case would Seriously Disrupt the Judicial and Penal Systems of Georgia	21
IV. Application of the *Whitus* Principle to the Instant Case would be Retroactive Application Despite Petitioner's Claim to the Contrary	28
V. The Evidence does not Show any Wilful Discrimination against Negroes in the Compiling of the Jury Lists	29

INDEX TO BRIEF—continued

Page

VI. Petitioner Cannot Complain of Alleged Discrimination Against Negroes on the Grand Jury Which Indicted Him, Because He is a White Man and is Not a Member of the Class Allegedly Discriminated Against, in the Absence of a Showing of Special Prejudice Against Him 31

Summary of Argument 36

Conclusion 37

Certificate of Service 39

Appendices

I. Opinion of Court of Appeals of Georgia, *Strauss v. State,* 113 Ga. App. 90 40

II. Opinion of Court of Appeals of Georgia, *Strauss v. State,* 116 Ga. App. 154 46

III. Georgia Laws, 1967 Session, page 251, Selection of Grand and Traverse Jurors 47

IV. Excerpts from the Proceedings Immediately Following the Opening Statement by the Assistant Solicitor General at the Original Trial of this Case, Initially with the Jury Excused from the Courtroom 49

TABLE OF AUTHORITIES

Page

Cases:

Allen v. State, 110 Ga. App. 56, 137 S.E. 2d 711 (1954) 31

Anderson v. Georgia, 36 Law Week 3344 7

Anderson et al v. State, 223 Ga. 174 (1967), 154 S.E. 2d 246 7

Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L. Ed. 1244 (1953) 28

Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L. Ed. 181 31

Barnes v. State, 111 Ga. App. 348, 141 S.E. 2d 785 19

Cassell v. Texas, 339 U.S. 282, 301, 70 S.Ct. 629, 94 L. Ed. 2d 839 13

Charles v. Maxwell, Warden, 348 F.2d 890 (6 Cir.) 34

Cobb v. Georgia, 389 U.S. 12, 88 S.Ct. 115, L. Ed. 2d (1967) 7

Cobb v. State, 222 Ga. 733, 152 S.E. 2d 403 7

Fay v. New York, 332 U.S. 261, 67 S.Ct. 1613, 91 L. Ed. 2043 32

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 25

Glasser v. United States, 315 U.S. 60 33

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed. 2d 106 24

TABLE OF AUTHORITIES—continued

Page

Hurtado v. California, 110 U.S. 516 13

Ivey v. State, 220 Ga. 699, 703-4, 141 S.E. 2d 541, 545 19

Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 ..... 24, 26

Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, L. Ed. 2d 7

Jones v. Parrott, 111 Ga. App. 750, 143 S.E. 2d 393 19

Jones v. State, 223 Ga. 157, 154 S.E. 2d 228 7

Kendrick v. Kendrick, 218 Ga. 460, 128 S.E. 2d 496 19

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 ..... 24, 26

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1648, 6 L. Ed. 2d 1081 24

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 24

Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L. Ed. 1074 (1935) 28

Purcell v. Hill, 220 Ga. 663, 141 S.E. 2d 152 19

Rabinowitz v. United States, 366 F. 2d 34 (CA 5, 1966) 31

TABLE OF AUTHORITIES—continued

Page

Salisbury v. Grimes, Sheriff, CA No. 11358, D.C.Ga., Northern District of Georgia ____ F. Supp. ____ (decided January 30, 1968) 25

Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, L. Ed. 2d 7

Sims v. State, 221 Ga. 190, 144 S.E. 2d 903 7

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 19 L. Ed. 2d 1199 25

Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1897) 28

Strauss v. State, 113 Ga. App. 90, 147 S.E. 2d 367 ..... 1, 8

Strauss v. State, 116 Ga. App. 154, 156 S.E. 2d 543 ..... 1, 2

Sullivan v. Georgia, 1131 Misc., 36 Law Week 3365 7

Sullivan v. State, 223 Ga. 643, 157 S.E. 2d 247 8

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L. Ed. 2d 758 ..... 12, 13

Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L. Ed. 2d 453 ..... 24, 26

Thiel v. Southern Pacific Company, 328 U.S. 217, 66 S.Ct. 984, 90 L. Ed. 1181 31

United States v. Harpole, 5 Cir. 1959, 263 F. 2d 71 12

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 25

TABLE OF AUTHORITIES—continued

Page

Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814, 99 L. Ed. 1161 (1955) 28

Whitus v. Georgia, 385 U.S. 545 (1967) 87 S.Ct. 643 2

Whitus v. State, 112 Ga. App. 328, 145 S.E. 2d 83 7

Whitus v. State, 222 Ga. 103, 149 S.E. 2d 130 7

Statutes:

Georgia Code §59-106-107 22

§92-6307 22

Georgia Laws 1967, Volume 1, pages 251-252, House Bill 307 23

Miscellaneous:

"Investigation into Crown Savings Bank Failure," Hearings Before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, Eighty-Ninth Congress, First Session, July 20-August 6, 1965 ..... 9, 10

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondent respectfully files this Brief opposing the above stated Petition and urges this Honorable Court to deny same for the reasons hereinafter set forth.

OPINIONS BELOW

Petitioner has correctly cited the decision of the Supreme Court of Georgia which is sought to be reviewed as 223 Ga. 384, 158 S.E. 2d 404, and has included it in his Appendix. Respondent cites the cases of *Strauss v. State*, 113 Ga. App. 90, 147 S.E. 2d 367, and *Strauss v.*

State, 116 Ga. App. 154, 156 S.E. 2d 543, and has set forth both of these decisions in Appendix I and Appendix II respectively, infra, pp. 40-46. The pertinency of these decisions will be discussed in another portion of this Brief.

JURISDICTION

Respondent concedes the jurisdiction of this Honorable Court to review the decision of the Supreme Court of Georgia in the instant case.

QUESTIONS PRESENTED

Respondent cannot agree with the wording of any of the three questions as set out in the Petition, because each assumes as true most material facts which Respondent insists were not proved by the evidence in the *habeas corpus* proceeding in the Superior Court, and which also are not pertinent to the issues in this case, in view of the extremely limited scope of the decision of the Supreme Court of Georgia which is sought to be reviewed.

Therefore, Respondent respectfully insists that the entire issue before this Honorable Court can be properly summed up in the following question:

1. Whether the ruling in *Whitus v. Georgia,* 385 U.S. 545 (1967) should be applied *retroactively* in the instant case where:

(a) No attack was made *prior* to jury trial upon the composition and method of selecting the Grand Jury which indicted Petitioner, and where the *first* such attack was made *collaterally* by State habeas corpus proceedings only *after conviction* of Petitioner and the subsequent *dismissal of his appeal.*

(b) Such a decision applying *Whitus,* supra, retroactively to *collateral attack* would afford *all* criminals now serving sentences in Georgia who were convicted upon indictments returned prior to January 29, 1967, the date of the *Whitus* decision, the opportunity to successfully attack their own convictions collaterally, and would thus have a serious impact – if not indeed a disasterous one – upon the application of criminal laws and the protection of the public in the entire State of Georgia, the area affected.

(c) The State of Georgia reacted immediately to the criticism in *Whitus* of its laws regulating the selection of jury lists from segregated tax digests by promptly repealing such laws on March 30, 1967, a little more than two months after *Whitus,* and prescribing an entirely new method of jury list selection which completely eliminates even the *possibility* of discrimination against prospective jurors because of their race or creed.

There is a second question which might *possibly* be involved in this case, as follows:

2. Whether Petitioner, as a *white* man, may complain of an alleged disproportionate number of *Negroes* on the Grand Jury which indicted him, where the crime charged, i.e. violation of the Georgia Securities Act, is a crime directed against the general public, of all races and creeds, and has no racial issues or overtones, and where no racial issues were injected into his subsequent jury trial.

We say this is a "possible" question, because the decision of the Supreme Court of Georgia was based solely upon the non-retroactive application of *Whitus* and not

upon the race of the Petitioner. However, the Superior Court did find that Petitioner as a white male has "not shown any harm to or discrimination against him". (R. 30).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those statutes enumerated in the Petition and set out in Petitioner's Appendix, the new act of the Georgia General Assembly in response to *Whitus* is involved, and is set out in Respondent's Appendix III, pp. 47-48, being Ga. Law 1967, p. 251, approved March 30, 1967.

STATEMENT

We are generally in agreement with most of the summation in Petitioner's Statement *of the evidence* adduced in the Habeas Corpus hearing, but we disagree with many of the conclusions drawn therefrom by Petitioner. For the sake of brevity, we will not re-outline the evidence as set out by Petitioner, but will simply correct mis-statements and supplement Petitioner's Statement by calling attention to evidence not mentioned by him in his Statement.

First, we wish to correct Petitioner's Statement on page 4 of his Brief that Petitioner asserted in this habeas corpus "that the grand jury which returned the indictment, *and the Petit Jury which convicted him,* had been made up — on an illegal and unconstitutional basis" (emphasis added). This statement is completely misleading, no doubt inadvertently so. No attack whatever was made in the hearing upon the *Petit Jury* which convicted Petitioner. Not one word of evidence was offered as to any disproportionately small number of Negroes on

the Petit Jury panels from which the traverse jury that convicted Petitioner was selected. In fact, that phase of the habeas corpus petition as amended was impliedly abandoned during the hearing, since no figures of any description were put in evidence about the composition by race of either the actual twelve trial jurors and two alternates or the more than 150 traverse jurors who were examined by counsel during selection of the jury. Indeed, Petitioner could hardly afford to go into the composition of those traverse panels which contained large number of Negroes. We wish to make it clear, in any event, that *this case deals solely with Grand Jurors,* and not with traverse jurors in any sense.

At this point, Respondent's counsel points out that we have no copy of the Record as certified to this Court by the Supreme Court of Georgia, and no such copy was retained by that Court. Neither can we precisely reconcile the records of the Superior Court available to us with the pages of the Record cited by Petitioner in his Brief. We are therefore unable to precisely document our subsequent references to the record of testimony in the *habeas corpus* hearing by use of the prescribed letter "R". We will have to document our references to that testimony by citing the transcript (T), using the page numbers appearing at the bottom of each page of said transcript of testimony.

We wish to supplement Petitioner's Statement by pointing out that Attorney LeRoy Hobbs, who testified as a defense witness, admitted that he was present during Petitioner's trial for some five or six days and as far as he knew, there was no issue in the trial involving race (T58).

Further, Petitioner admitted on cross-examination that

he was not a member of the NAACP, or the Student Non-Violent Coordinating Committee; that he had never taken any part in registering Negroes to vote or helping them get on or off juries; and that he had never been identified in any way with the "so-called civil rights movement" (T61-62).

Petitioner further admitted that there was one Negro man who testified in the trial that he had lost some money and that the bank officials who testified in the jury trial were Negroes (T63-64). This evidence is pertinent because of the allegations in Petitioner's Brief (at page 18) and in his Appendix (pp. 6-9) that the State tried to inject the racial issue into the jury trial. We will discuss this gross distortion of the actual facts later in this Brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Facts In This Case are Clearly Distinguishable in Several Ways from those in *Whitus v. Georgia*, 385 U.S. 545, and Cases Following Whitus.

(a) The issue of alleged jury discrimination was raised collaterally instead of prior to trial and on Direct Appeal.

First, the attack upon the composition of the Grand Jury which indicted Petitioner in 1964 is made *collaterally* by State habeas corpus. It was made *for the first time* after the jury trial of Petitioner, his conviction and the subsequent dismissal of his appeal (Petitioner's Brief, pp. 3-4).

In each of the recent decisions of this Court relied upon by Petitioner the composition of *both* the Grand

Jury and the Petit Jury was challenged *prior to trial* by timely pleas in abatement of the indictment and challenges to the array of traverse jurors. See *Whitus v. Georgia,* supra, 385 U.S. 545 at 547, and the cases as reported below, *Whitus v. State,* 112 Ga. App. 328, 145 S.E. 2d 83 (challenge to grand jury array before indictment) and *Whitus v. State,* 222 Ga. 103, 149 S.E. 2d 130 (challenge to the array of petit jurors); *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, L.Ed. 2d , Oct. 16, 1967, and the case as reported below, *Jones v. State,* 223 Ga. 157, 154 S.E. 2d 228 (plea in abatement prior to trial attacking grand jury composition, and challenge to the array attacking composition of traverse jury list); *Cobb v. Georgia,* 389 U.S. 12, 88 S.Ct. 115, L.Ed. 2d (1967) and the case as reported below, *Cobb v. State,* 222 Ga. 733, 152 S.E. 2d 403 (challenges to the arrays of both grand and traverse juries plus special demurrer to the indictment); *Sims v. Georgia,* 389 U.S. 404, 88 S.Ct. 523, L.Ed. 2d , (1967), and the case as first reported below, *Sims v. State,* 221 Ga. 190, 144 S.E. 2d 903 (challenge to the array, plea in abatement of the indictment and motion to quash indictment); and *Anderson v. Georgia,* 36 Law Week 3344 (March 15, 1968) and the case as reported below, *Anderson et al v. State,* 223 Ga. 174 (1967), 154 S.E. 2d 246, (motion to quash indictment and challenge to array of traverse jury).

In another case decided so recently that it is not cited by Petitioner, *Sullivan v. Georgia,* 1131 Misc., 36 Law Week 3365, (decided March 19, 1968), the Petitioner in that case also attacked the composition of both the grand jury and petit jury *before trial* by a motion to quash the indictment and sustain a plea of abatement on the

grounds that *both* the grand and traverse juries were illegally constituted. See the case as reported below, in *Sullivan v. State,* 223 Ga. 643, 157 S.E. 2d 247.

Thus, the opinions of the Georgia Appellate Courts, in conjunction with some of the opinions of this Court, show that direct challenges to the composition of both the grand and petit juries were made *prior to trial* in each of the foregoing cases. Therefore, this case stands *alone* as the very first Georgia case in which it is sought to apply *Whitus* retroactively to a collateral attack on the *grand jury only* after final conviction by a petit jury, the composition of which was never attacked.

(b) This Case is a Non-racial One where a White Man Seeks to Attack an Alleged Disproportionate Number of Negroes on the Grand Jury Which Indicted Him.

Despite the strained efforts of Petitioner to inject a racial issue into this case, there is none. This was a prosecution for a violation of the Georgia Securities Act involving a gigantic swindle of the general public through the sale of worthless commercial money orders. See the opinion of the Court of Appeals of Georgia in *Strauss v. State,* 113 Ga. App. 90, which is set out verbatim in Respondent's Appendix I, pp. 40-45. Here the Petitioner tested the legal sufficiency of the indictment against him prior to trial (without raising the *Whitus* Grand Jury question, however). This opinion sets out in detail the conspiracy alleged, involving many acts of fraudulent misrepresentations, falsification of bank records of the Crown Savings Bank in the amount of $205,000.00, fraudulent transfers between bank accounts, a massive "check-kite" and the collection of money in excess of $118,000.00 from agents selling the money orders *after*

the Crown Savings Bank (the bank used by the conspirators for payment of the money orders) had been closed, resulting in the defrauding of purchasers of these money orders caused by the Petitioner's refusal to refund this money to them. The legal sufficiency of the indictment was upheld by the Georgia Court of Appeals.

In the interest of brevity, we will not further summarize the details of the vicious scheme by which this Petitioner defrauded thousands of impoverished persons who bought his worthless money orders. However, we respectfully urge this Honorable Court to study carefully the opinion set out in our Appendix I. The recitation of the fraudulent scheme alleged in the indictment, which was proven in every detail upon the trial, show conclusively that there was no racial issue in this trial, and that Petitioner Strauss could in no way have been harmed by having only one Negro on the Grand Jury which indicted him.

In fact, an all-Negro Grand Jury would probably have been equally as quick to indict as the one which indicted him, because it is reasonable to assume that the majority of these defrauded money order purchasers were Negroes, since as a rule only poor people without bank accounts use commercial money orders to pay their obligations. Also, the Crown Savings Bank, an all-Negro Bank (Petitioner's Brief, Page 18 and Appendix, 6-9) collapsed and failed in large part because of the devious schemes, "check-kites" and falsification of bank records perpetrated by Petitioner and his codefendants.[1]

---

[1]So stunning was the failure of this bank that an exhaustive investigation was made in public hearings by the United States House of Representatives. See the "Investigation into Crown Savings Bank Failure", Hearings Before the Subcommittee on

In strong contrast to the non-racial aspects of this case is the definite racial overtones and possible racial prejudices inherent in *Whitus* and the cases following it. In *Whitus,* a Negro was charged with the murder of a white man. In *Jones,* a Negro was charged with the murder of a white woman. In *Cobb,* a Negro was charged with the murder of a white man. In *Sims,* a Negro was charged with the rape of a white woman. In *Anderson et al,* about 200 "colored persons" were engaging in a "freedom march" in Crisp County, Georgia, and two of the marchers attempted to lower the American flag, tearing it in the process, because "the Negro community was in a state of mourning." (223 Ga. at 179). In *Sullivan,* a Negro was charged with the murder of a white man. All of these foregoing cases relied upon by Petitioner posed definite racial issues – this case had none.

(c) Composition of the Grand Jury only is Challenged Here.

Petitioner here has challenged *only the Grand Jury* which indicted him and *not* the composition of the *traverse jury* which convicted him, as contrasted with *Whitus* and the cases previously cited which follow the *Whitus* ruling. Each of those cases challenged both the composition of the grand *and* traverse juries. We feel there is a real distinction between an attack upon alleged *grand jury* discrimination *only,* and an attack upon the traverse jury or upon *both* the grand and traverse juries.

Domestic Finance of the Committee on Banking and Currency, House of Representatives, Eighty-Ninth Congress, First Session, July 20-August 6, 1965, as printed by the U.S. Government Printing Office, *where Petitioner Strauss refused to answer questions and plead immunity under the Fifth Amendment approximately 128 times* (pp. 383-395).

In *Whitus,* this Court was dealing primarily with an instance of an alleged *illegal petit jury box*. The opinion by Justice Clark sets forth in the third paragraph that *"a challenge to the array* of petit jurors" was presented before trial, and denied. The decision held that the challenge to the grand jury was also involved in the appeal, so this Court considered both the Mitchell County petit jury list and the grand jury list.

Having consolidated the two questions into one question, the *Whitus* decision then proceeds to consider it from an overall standpoint. After considering the fact that the Mitchell County tax digest sheets were used by the jury commissioners and that those sheets were of different colors for white and Negro taxpayers, and considering some statistics which were proven showing that the percentage of Negroes on the jury venires was noticeably smaller than the percentage of Negro taxpayers, this Court declared that "under such a system the *opportunity for discrimination was* present and *we cannot say* on this record *that it was not* resorted to by the commissioners."

By means of this *double negative,* this Court reversed the case and sent it back to Georgia "for further proceedings not inconsistent with this opinion." By our re-referring to it as a *double negative,* we mean to point out that this Court did not hold that there *had been* "purposeful discrimination" against Negroes, as the Strauss habeas corpus alleges and as the Petitioner's Brief contends, but this Court only held that there was a "presumed discrimination" in view of all the facts shown in the *Whitus* record.

It is unfortunate that this Honorable Court did not reach the question of the alleged illegality of the *grand*

jury, as a distinct question separate from the alleged illegality of the petit jury as a ground for appellate court reversal, because exclusion from a grand jury is not as serious as exclusion from trial juries. *United States v. Harpole,* 5 Cir. 1959, 263 F.2d 71. In that case, involving conviction of a Negro of murder of a white person, with death penalty, in Mississippi, there was no objection at the State trial to the indictment, nor to the composition of the grand jury, nor to the petit jury panel. But in Federal habeas corpus later these subjects were raised and it was contended that the grand jury and the petit jury panels were illegal because of discrimination against Negroes. Discussing the question at considerable length, and the fact that white counsel at the trial had failed to raise the questions at the trial that grand jury and petit jury panels were illegal because of discrimination against Negroes, the Fifth Circuit Court of Appeals held that as to the *petit jury* discrimination the Negro defendant should not be held to have waived the right to object, but that "the objection to the grand jury was waived and the appellant is now legally detained upon his indictment for murder" (263 F.2d at 84).

In ruling that discrimination in the formation of the grand jury was not as serious to the defendant as discrimination in the petit juries, and that the question might be considered as waived as to the grand jury, the Fifth Circuit said, in part:

> "The U.S. Constitution does not guarantee to a defendant in a state court a trial before a jury in which his own race is proportionately represented, nor a trial before a jury composed in any part of members of his race, nor even to a jury trial at all, if other defendants are not accorded a jury trial . . ."

See also *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824,

13 L.Ed. 2d 759, holding that there is no requirement that the grand jury box from which a grand jury is drawn shall be proportionate as between the races.

The *Harpole* case, supra, also quoted approvingly (on page 80) the following language by Justice Jackson dissenting in *Cassell v. Texas,* 339 U.S. 282, 301, 70 S.Ct. 629, 94 L.Ed. 2d 839, as follows:

> ". . . A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance of impartiality, especially when the accused is a Negro and the alleged victim is not.
>
> "The grand jury is a very different institution. The States are not required to use it at all. *Hurtado v. Calif.,* 110 U.S. 516. *Its power is only to accuse,* not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. . . ."

Applying the foregoing cases to the gigantic fraudulent scheme alleged against Petitioner (as recited in Appendix I of Respondent), it is clear beyond question that almost any conscientious Grand Jury, be it composed in its entirety of white persons, of Negroes, of Chinese or of Puerto Ricans would have returned an indictment against Petitioner, if sufficient evidence was given it to show probable cause that Petitioner was guilty.

A more serious question might have been presented if this case posed an alleged disproportionate number of Negroes on the *traverse* jury which convicted Petitioner and fixed a *15 year* total sentence. But this Petition deals *solely* with the *grand jury*. We respectfully insist that an

alleged disproportionate number of Negroes is not nearly so serious in a grand jury as in a traverse jury. The indictment returned by a grand jury is not an adjudication of guilt. It is not evidence against the defendant. Its sole function is to bring the indicted defendant into Court. An indictment simply says, "We find there is sufficient evidence to warrant the trial of this defendant before a petit jury." On the other hand, the traverse jury determines controverted issues of fact, decides the guilt or innocence of the defendant, and in Georgia fixes the punishment to be imposed upon the defendant whenever a guilty verdict is returned. And this record is completely devoid of any evidence of alleged discrimination against Negroes on the *petit* jury which convicted Petitioner. Any real harm or prejudice to Petitioner would have resulted from the composition of the petit jury – not of the grand jury.

In summary, we point out that this case is distinguishable from *Whitus,* and cases following, in three respects, to-wit: (1) It attacks the composition of the grand jury collaterally instead of prior to trial (2) It is a non-racial case involving a white defendant charged with a fraudulent scheme diverted against the general public and (3) It attacks *only* the *grand jury* composition and *not* the composition of the *traverse* jury.

II. The State did not Wilfully Inject any Racial Issue into the Jury Trial as Asserted by Petitioner.

Petitioner's counsel should be well-aware that there was no racial issue involved in the jury trial of Petitioner. Two Negro banks were used as the instruments of Petitioner's fraud and one failed as a result thereof. Negro citizens were defrauded by purchasing Petitioner's worthless money orders and Negro bank witnesses

testified for the State (T63-64). Attorney LeRoy Hobbs, a member of Attorney Harold Karp's own law firm, testified there was no issue involving race in the trial so far as he knew (T57-58).

Nevertheless, counsel for Petitioner continue to harp upon an obviously spurious effort made by *defense counsel* at the very outset of the month-long jury trial *to make it appear* that the State prosecutor, J. Robert Sparks, *was* injecting race into the case.

Petitioner says on Page 18 of his Brief (and also adds an Appendix to support his argument) that Mr. Sparks made "an appeal to the coarsest kind of prejudice against people who deal, or do business, with Negroes" in his opening statement to the jury outlining his expected evidence. This claim of the injection of racial prejudice into the trial is based *solely* upon Mr. Sparks' *identification* of the two banks utilized by Petitioner in his tremendous fraud as "an all Negro bank" (referring to the Crown Savings Bank, Newport News, Virginia, which Petitioner helped collapse) and "which is also a Negro bank here in Atlanta" (referring to the Citizens Trust Company). See Petitioner's Appendix, pages 8, 9. These words "all Negro bank" and "also a Negro bank" are the sole words which Petitioner claims injected a racial issue into this case. It is not claimed that the prosecuting attorney made any disparaging or insulting remarks about "people who deal with Negroes" or that he uttered any insults, innuendoes, or coarse remarks about either Negroes, Negro banks, or people who do business with such banks. Indeed, Petitioner's Appendix (pages 8, 9) shows *affirmatively* that no such racial remarks were made by the prosecuting attorney.

We freely admit that the two banks *were* identified by

Mr. Sparks as "all Negro" and "Negro" exactly as set forth in Petitioner's Appendix. However, we emphatically deny that such words were intended to inject any racial prejudice into the trial, or that they did in fact do so. Mr. Sparks knew that he would use various officials from those banks as witnesses and that they would all be Negro citizens; therefore, his designation of the banks as Negro ones in his opening statement clarified for the jury the reason why all bank witnesses to appear before them would be of the Negro race, rather than all white, or a mixture of both races. Secondly, there was a real necessity to identify the Atlanta bank, i.e., the *Citizens Trust Company,* for the jury, because there are two other banks in Atlanta having somewhat similar names. These are the *Trust* Company of Georgia, and the *Citizens* and Southern National Bank. The "Citizens Trust Company" name is a combination of parts of the names of these two larger banks, and the jury could easily have become confused as to *which* Atlanta bank the prosecuting attorney was referring.

These allegations of Petitioner of deliberate State injection into the trial of a racial issue are clearly misleading to this Honorable Court, since Petitioner has completely failed to include in his Appendix, or to even refer to the proceedings which took place *immediately after* this opening statement. We will therefore attach as Respondent's Exhibit IV the transcript of portions of the proceedings immediately after Mr. Sparks concluded his opening statement to the jury (pp. 49-51), and summarize those proceedings here.

Defense Attorney Wesley Asinof moved for a mistrial, *in the absence of the jury,* (Respondent's Appendix IV, p. 49) because of the Solicitor's reference to these

two banks as being "Negro banks". The Solicitor disclaimed any intention of injecting prejudicial racial matter into the trial (Respondent's Appendix IV, pp. 49-50) and stated that he was simply identifying the banks, as he would have Negro employees from the banks as witnesses for the State. *The Court then recalled the jury,* where the following took place:

THE COURT: "Lady and gentlemen, of the jury, the Solicitor General, Mr. Sparks, the Assistant Solicitor General, in his opening statement referred to two banks as being all Negro banks. *Do not let that statement of the Solicitor General prejudice your mind one way or another against the defendant on trial in this case.* I shall hear from you, Mr. Sparks".

MR. SPARKS: "Your Honor, I meant no racial prejudice at all in making the statement. *I was simply trying to identify the banks,* one being an Atlanta bank and one being a Virginia bank. A number of witnesses will appear from each of the banks, *and they will be persons of the Negro race,* and I was simply attempting to identify the banks. *I did not mean any racial connotation. I did not intend to install any racial prejudice or inject any racial prejudice into the case. And if I did, I apologize to the jury, and I apologize to the Court. And I ask the jury not to consider that remark and to forgive me for having made it. And I state again that I did not intend any racial prejudice* in the case because witnesses, *both Negro and white,* will appear for the State *equally.*"

THE COURT: "As I have previously stated, lady and gentlemen, *do not let that statement with reference to the banks being owned by Negroes influence your minds one way or the other.* We are trying this case upon the evidence and the evidence alone. I shall overrule your

motion. You may call your first witness". (State's Appendix IV, p. 51).

After the foregoing action by the Court, both prior to and following the Solicitor's explanation of his opening statement and his apology to the Court and jury, trial defense counsel *did not renew his motion for mistrial or request any further instruction or corrective action by the Court,* and the first witness was sworn (Respondent's Appendix IV, p. 51). Obviously the trial defense counsel was satisfied with the action of the Solicitor and the Court. It is in fact difficult to see where any racial prejudice could have been injected in the trial simply by the Solicitor's identifying two banks through which the Petitioner operated his fraudulent scheme as being Negro banks. If any possibility of racial prejudice existed, it was certainly completely eradicated by the explanation and apology of the prosecuting attorney to the jury, and the instruction of the Court, twice stated, that the jury would not consider the Negro ownership of the banks. This is the sole matter that Petitioner can point to in a month-long trial to show any racial overtones, and it is completely insignificant.

We feel that Petitioner has been less than candid with this Honorable Court by categorically stating that racial prejudice was injected into the trial by this opening statement, without calling to this Court's attention in any way the foregoing proceedings which clearly eliminated any possibility of racial prejudice being attributed to these statements. It has been left to Respondent to bring to the Court's attention the whole truth about this claim of racial prejudice.

In retrospect, the defense motion for mistrial appears to be more in the nature of a tactical move by the ex-

tremely able defense counsel to throw the prosecuting attorney off-stride at the very commencement of his case than any real concern that a racial issue had been introduced into the trial to his client's detriment. He did not even renew his mistrial motion after the apology by the Solicitor to the jury and the Court's corrective action. He undoubtedly was well-aware of the Georgia rule that where a motion for mistrial is made, and the trial court instructs the jury to disregard and not to consider the alleged error or statement upon which such motion was based, if the motion for mistrial is not renewed or further instructions to the jury are not requested after such corrective action by the Court, an assignment of error upon appeal based on the denial of the motion for mistrial presents nothing for review. *Kendrick v. Kendrick,* 218 Ga. 460, 128 S.E. 2d 496; *Barnes v. State,* 111 Ga. App. 348, 141 S.E. 2d 785; *Jones v. Parrott,* 111 Ga. App. 750, 143 S.E. 2d 393; *Purcell v. Hill,* 220 Ga. 663, 141 S.E. 2d 152; and *Ivey v. State,* 220 Ga. 699, 703-4, 141 S.E. 2d 541, 545. Therefore, he was precluded from asserting error in his direct appeal which was dismissed and did not attempt to do so. Instead, this dead issue has been resurrected in an attempt to convince this Court that Petitioner Strauss was the victim of some sort of racial plot in Georgia, and was actually prejudiced by having only one Negro on the Fulton County Grand Jury which indicted him.

The matters contained in Respondent's Appendix IV were also before the Supreme Court of Georgia in response to another identical Appendix of Petitioner. Also, the Georgia Supreme Court had access to the trial record on file in its own Court and in the Court of Appeals

where the direct appeal was dismissed and certiorari was denied by the Georgia Supreme Court.

In summary, we earnestly insist that this claim of "actual prejudice" is a totally spurious one, resorted to by Petitioner as a "last-ditch" effort to somehow drag this case into the racial setting of *Whitus* and cases following it. We urge this Court to view this case in its true context — a white man being prosecuted for a gigantic swindle of the general public and using two Negro banks as his unwitting tools (and breaking one Negro bank in the process).

Finally, this claim of racial prejudice through the prosecutor's opening statement would appear to be *res judicata* now, in view of the dismissal of Petitioner's direct appeal by the Court of Appeals (Respondent's Appendix II, p. 46). In this connection, although the appeal *was* dismissed *sua sponte* as stated by Petitioner (Brief, p. 3), the reason for such dismissal was the failure of the Petitioner to *either* file the record in the Court of Appeals of Georgia within 30 days after his Notice of Appeal *or* to request and obtain a court order enlarging the time for filing the record with that Court (See Respondent's Appendix II). It was not an arbitrary or capricious dismissal of the appeal, as might be inferred from Petitioner's Brief.

We therefore respectfully insist that there was no racial aspect or issue in this case, either before the grand jury or in the actual jury trial, by which any actual prejudice was shown to Petitioner, a white man, by any alleged disproportionate number of Negro citizens on the grand jury which indicted him.

III. The Application of Whitus Retroactively to Collateral Attack in this Case would Seriously Disrupt the Judicial and Penal Systems of Georgia.

This case was tried in September and October, 1966, and Petitioner was convicted by the trial jury on October 12, 1966 (Petitioner's Exhibit B, R 98) — a full three months before this Court's decision in *Whitus*. As previously pointed out, no attack was made on either the Grand Jury or upon the composition of the traverse jury panels from which the trial jury was selected. The issue of alleged disproportionate inclusion of Negroes on the Grand Jury was not raised at all. It was first raised after final conviction of Petitioner (dismissal of his appeal for failure to timely file the record) by State habeas corpus action. This poses the question of whether *Whitus* should be applied retroactively to collateral attack after final conviction.

(a) Retroactive Application of Whitus Could Affect Nearly All Imprisoned Felons in Georgia.

If this Honorable Court should apply the *Whitus* principle retroactively in the instant case where the grand jury is collaterally attacked, it very easily could — and in all probability would — throw wide-open the judicial doors to similar collateral attacks by every convicted felon now incarcerated in the penal system of this State. Such a decision would afford every murderer, rapist, armed robber, safe-cracker and confidence man now serving a sentence under an indictment returned in Georgia prior to January 23, 1967 — the date of the *Whitus* decision — the opportunity to launch a similar collateral attack, with considerable hope of success, upon their respective convictions, regardless of the race of the felons or the nature of their crimes. No special showing

of prejudice to them by the composition of the grand juries which indicted them would be necessary.

This is true because, rightly or wrongly, all Georgia jury lists prior to *Whitus* were required by law to be compiled from the tax books (Ga. Code Ann. 59-106, 107), which in turn were required by another Georgia statute to be segregated by race (Ga. Code Ann. 92-6307). Thus, the primary evil condemned by *Whitus* — the compilation of the jury lists from segregated tax records — would exist in the jury lists of every Judicial Circuit in this State. Then, a mere showing of a disproportionately small number of Negroes — not a total exclusion — on the respective grand juries collaterally attacked, would mean that each and every one of these convicted felons should be granted a new trial. As the Supreme Court of Georgia pointed out in its opinion below, these felons could possibly be set free because of inaccessibility of witnesses and their failing memories and "hordes of such criminals would be turned loose upon society" (223 Ga. 834, 838).

We most respectfully point out that it has never been the policy of this Honorable Court in the past to cause judicial or penal chaos in any single State or any number of States by retroactive application of newly-stated constitutional principles or guidelines. Particularly is this true where the State or States affected have responded promptly and with deference to such decisions of this Court, and acted promptly to correct the situation criticized by this Court. The primary aim of this Court in such constitutional interpretations, when applied to the States through the due process clause of the Fourteenth Amendment, has been to encourage reform of the criticized practices in the several States, and to secure com-

pliance of the States affected with the constitutional guideline laid down by this Court.

(b) Georgia has Proceeded with all Possible Speed to Comply with Whitus.

No State could have moved more swiftly to comply with *Whitus* than has the State of Georgia. On March 30, 1967 — only nine weeks after *Whitus* was announced — the Georgia General Assembly's response to *Whitus* became law. House Bill 307, Ga. Laws 1967, Vol. 1, Pages 251-252, struck the old law relative to the method of compiling jury lists *in its entirety* and provided that "immediately after the passage of this Act and thereafter at least biennially" the jury commissioners shall compile and revise a jury list to be selected from the official voter's list used in the last general election. If this list so compiled is not a fairly representative cross-section of the upright and intelligent voters of the County, the commissioners shall supplement the list by going forth into the county and including citizens of *any significantly identifiable group* in the county *which is not fairly represented on the jury list.* (See Respondent's Appendix III, pp. 47-48, giving the entire text of the new Act.)

Thus Georgia has done all it can to eliminate the "evil" condemned in *Whitus* of selecting jury lists from segregated tax records. Also, contrary to the expressed fears of Petitioner in his Brief that state officials may "engage in an interminable hare-and-hounds contest with this Court" (Brief, p. 21) or that failure of this Court to apply *Whitus* retroactively "might well invite a reliance by Georgia officials on some new method of selection which would, nevertheless, accomplish the unlawful result (of systematic exclusion of Negroes from juries)" (Brief, p. 26), we represent to the Court that the new Act is now

being implemented all over the State of Georgia. Many smaller judicial circuits in primarily rural areas where the population is small have already completed revision of their jury lists from the registered voters lists. This county of Fulton, which embraces nearly all of Atlanta, Georgia and is many times larger than any other Georgia County by population, has virtually completed revision of its jury lists from the registered voters list. Within a month or six weeks Fulton County is expected to have its revision completed and jurors, both grand and petit, will thereafter be drawn from this revised list. No one is attempting to circumvent *Whitus,* to our knowledge.

This result seems to us to be all that this Honorable Court intended to accomplish by its decision in *Whitus* and cases following, except of course to reverse convictions in those specific cases where *timely attack* was made *before trial* upon the composition of *both* grand and petit juries.

We therefore urge this Court to follow the same course it has previously pursued in refusing to give retroactive application to new and somewhat revolutionary (when applied to the States) constitutional concepts in four major cases[2].

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[2]*Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed. 2d 1081 (search and seizure) held not retroactive in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601; *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (impermissible to comment on failure of accused to testify), held not retroactive in *Tehan v. Shott,* 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed. 2d 453; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (necessity of intelligent waiver of counsel after complete advice as to right to have counsel present during interrogation), held not retroactive in *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882; and two cases decided

In two of these cases where this Court declined to give retroactive application to a new constitutional concept, the Court expressed its concern for the potential impact of retroactive application upon the States or areas affected[3].

We therefore will adopt the colorful terms of Petitioner (Brief, p. 25) and respectfully insist that "a mass legalized jailbreak" from the penal system of Georgia could easily result from a retroactive application of *Whitus* in the instant case.

(c) A United States District Court in Georgia has Indicated that Whitus Should not be Applied Retroactively.

In a federal habeas corpus action, *Salisbury v. Grimes, Sheriff*, C.A. No. 11358, Northern District of Georgia, ... F. Supp. ..... (decided January 30, 1968, and not yet reported), the petition alleged disproportionate inclusion of Negroes on the *Grand Jury* of Fulton County which indicted Salisbury for the *armed robbery of a supermarket*. Factually, the case is strikingly similar to the instant one. Salisbury was a *white man* convicted for the third time (his first two convictions were reversed by the Supreme Court of Georgia) who, after his third conviction was affirmed, for the first time attacked the composition of the *grand jury only* by a *collateral* attack in

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together on same day, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (right of accused to presence of his lawyer at "lineup"), held not retroactive in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed. 2d 1199.

[3]This Court observed that retroactive application "would seriously disrupt the application of our criminal laws" in *Johnson v. New Jersey*, supra, Note 2, and "would have a serious impact" upon the area affected, in *Stovall v. Denno*, supra, Note 2.

federal court. Like the instant case, there was no racial issue in *Salisbury*. There were no Negroes on the *Salisbury* grand jury, compared to one Negro on the *Strauss* grand jury. Like Petitioner in this case, Salisbury attacked *only* the grand jury and *not* the petit jury. In *both cases,* the respective indictments were returned *prior* to *Whitus,* and the jury trials were completed *prior* to *Whitus*. United States District Judge Frank A. Hooper (sitting as a Retired Judge – he was formerly Chief Judge of that Court) denied the petition for writ of habeas corpus and remanded Salisbury to the custody of the Sheriff, in a lengthy and scholarly 28 page opinion. While the District Court did not base its denial of the writ on the issue of non-retroactivity of *Whitus,* Judge Hooper did state in part:

> "This petitioner through his counsel relies heavily upon the *Whitus* case and earnestly insists that it was retroactive and that the principles therein decided were binding on the Georgia court at the time that court conducted the third and final trial of Salisbury. If it were necessary to decide whether or not the *Whitus* case was in fact retroactive, this Court *would without hesitation rule that it was not retroactive* in light of several recent decisions by the United States Supreme Court. See *Sylvester Johnson et al vs State of New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882 (June 20, 1966). See also *Victor Linkletter vs Walker,* 381 U.S. 618, 14 L. Ed. 2d. 601 (June 7, 1965) and *Tehan vs Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, decided January 19, 1966". (Emphasis added. Opinion, page 5).

The District Court further found that evidence in the hearing showed there were "7,600 felons in the State Penitentiary of Georgia and a considerable number of them were indicted by grand juries selected in the same

manner as the Salisbury grand jury, but subsequently tried before petit juries selected in a manner above criticism". (Opinion, page 14).

The District Court then denied the petition for writ of habeas corpus as follows:

> "(a) Neither the United States Supreme Court nor the Court of Appeals of the Fifth Judicial Circuit have ruled that *partial* exclusion of Negroes from a grand jury in a State court constitutes sufficient ground for setting aside a conviction in a trial wherein no error appears, *defendant being a white man.*
>
> (b) That a federal court is not justified in setting aside the conviction of a defendant, *a white man,* in a State Court even though discrimination was exercised in the *partial* exclusion of Negroes from the grand jury, *where no prejudice against the petitioner on his trial was shown,* and where three successive trial juries which were legally constituted and selected have returned a verdict of guilty against such defendant." (Opinion, page 21. Emphasis added.)

We add that a Notice of Appeal has been filed by the Petitioner Salisbury in the Fifth Circuit Court of Appeals from the foregoing opinion and order.

While we recognize that the opinion of a single District Court Judge is in no way binding upon this Honorable Court, we do feel that Judge Hooper's reasoning is exactly in point with the issues in this case and should be at least persuasive. The figure of 7,600 potential habeas corpus petitioners now confined in Georgia's penal system is graphically illustrative of the problem Georgia will face if a white man may collaterally attack his conviction under *Whitus* in any sort of case without a showing of actual prejudice.

IV. Application of the Whitus Principle to the Instant Case would be Retroactive Application Despite Petitioner's Claim to the Contrary.

Petitioner argues in Section II of his Brief (pp. 18-22) that the issue of retroactivity has no place in this case since *Whitus* did not change any existing law but was "only a continued application of decades of authority". We disagree. Without attempting an extended analysis of the principal cases he relies upon, we will briefly point out that each such case was decided upon a different basis than *Whitus*. In *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1897), West Virginia law provided that only *white* males who were 21 years old were liable for jury service. This is *total* exclusion of Negroes *by law*. In *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L. Ed. 1074 (1935), undisputed evidence showed that no Negro had ever served on any grand or petit jury within the memory of numerous witnesses, including the clerk of court, court reporter, and other officials of undeniable veracity. Here there was *total* Negro exclusion by *practice of officials*, rather than by law.

In *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L. Ed. 1244 (1953), the names of jurors in the box were segregated by color, with white tickets for white persons and yellow tickets for Negroes. Not a single Negro was included in the list of 60 petit jurors drawn for the trial, though many were available. Further, *no Georgia law authorized* this segregation of prospective jurors in the jury box by different colored slips (see 345 U.S. at 562). Here was *total exclusion not authorized by Georgia law*. This same practice of different colored tickets in the jury box caused the reversal in *Williams v. Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L. Ed. 1161 (1955). The *Williams*

case was tried two months before *Avery* was decided by this Court (349 U.S. at 379) which apparently accounts for the failure of Fulton County to have abandoned the white and yellow ticket system in the jury box, not having anticipated the decision in *Avery*. These are the principal cases relied upon by Petitioner.

We earnestly insist that there is nothing in *Strauder, Norris, Avery* and *Williams* which could have put the State of Georgia on notice that State statutes of long standing requiring compilation of jury lists from tax records which were in turn required to be segregated by a widely-separated statute would be stricken down in *Whitus*. *Whitus* is different from these four prior cases in that these other cases involved total exclusion of *Negroes*, either by law or by *ultre vires* acts of State officials, whereas *Whitus* was decided on the basis that the system afforded an *opportunity for discrimination* which this Court could not say was not resorted to by the jury commissioners. If this Court had held in *Avery* and *Williams* that compilation of jury lists from segregated tax records was discriminatory, then application of *Whitus* to this case *would not* be retroactive. However, this Court said nothing about this method of selection in *Avery* and *Williams*, although citing those statutes requiring such a mode of selection. Therefore, we feel it is quite clear that any application of *Whitus* to the instant case, which was tried three months prior to the decision in *Whitus*, would constitute retroactive application. And we again urge this Court *not* to resort to retroactive application.

V. The Evidence does not Show any Wilful Discrimination against Negroes in the Compiling of the Jury Lists.

While we do not think there is any real issue in this case as to whether the evidence makes out a *prima facie* case of discrimination under *Whitus*, in view of the limited holding of the Supreme Court of Georgia which did not reach the constitutional issue, Petitioner throughout his brief assumes and constantly reiterates that this is a worse case of discrimination than *Whitus*. In so doing, he is placing his own interpretation upon the testimony of the commissioners and drawing his own conclusions therefrom. We will not burden this Brief, which is already overlong, by dissecting the testimony of each commissioner and drawing our opposite conclusion from it. However, we refer this Court to the carefully-considered opinion and order of Chief Judge Ralph Pharr before whom the *habeas corpus* hearing was held (R. 28-36). He found, among other facts, that the Jury Commissioners did not discriminate against any race; that the only use of the colored tax returns was by one jury commissioner who used it for the purpose of *putting Negroes on the* jury list (see testimony of Commissioner Shukraft, a self-styled "intellectual liberal", at T 27-28); and that there were large numbers of Negroes' names on both grand and petit jury lists. Ample support for these findings can be found in the record.

We also call attention to the judicial notice which Chief Judge Pharr took of the fact that in 1964 – the year of the Strauss indictment – there were many Negroes whose names were in both jury boxes; these names were printed in black on white slips of paper and it was impossible for a Judge to know whether any name drawn was that of a white or colored person.

In one final word in passing, we point out that Petitioner chose in his table on Page 15 of his Brief compar-

ing respective figures and percentages in *Whitus, Jones,* and the instant case to show 14.99% of the Fulton County taxpayers as Negroes, and 2.7% as Negro Jurors in this case, instead of showing that there was one Negro on the 23 member Grand Juror which indicted Petitioner, or a percentage of 4.3% Negro representation on the actual grand jury which returned the indictment. (T. 57).

We therefore do not at all concede that the evidence in the hearing brings this case under *Whitus.* In our view, this resolution of this factual issue is not essential for determination either way because of the limited extent of the ruling of the Supreme Court of Georgia in declining to give retroactive application to *Whitus.*

VI. Petitioner Cannot Complain of Alleged Discrimination Against Negroes on the Grand Jury Which Indicted Him, Because He is a White Man and is Not a Member of the Class Allegedly Discriminated Against, in the Absence of a Showing of Special Prejudice To Him.

Petitioner has cited several cases in support of his position that he can complain of "systematic exclusion" (there is no evidence of "exclusion" in this case) of a class from juries without being a member of the class excluded. However, we earnestly insist that each case is distinguishable from the instant one. He relies chiefly on *Ballard v. United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181; *Allen v. State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1954); *Rabinowitz v. United States,* 366 F.2d 37 (CA 5, 1966); and *Thiel v. Southern Pacific Company,* 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181. (Petitioner's Brief, pp. 16, 17). Each is clearly distinguishable.

Both *Ballard* and *Thiel* were cases in *federal district courts.* In *Ballard,* a mail fraud prosecution, this Court reversed the conviction because women had been "intentionally and systematically excluded" from the federal jury panel although the local state law (California) made women eligible for jury duty. In so doing, this Court stated in part ". . . as in the *Thiel* case, we should *exercise our power of supervision over the administration of justice* in the *federal courts*". (329 U.S. at 193 Emphasis added).

In the *Thiel* case, a tort action removed from State to the federal district court, the petitioner moved to strike the entire *federal* jury panel on the grounds that daily wage earners were excluded and that the federal panel was comprised of mostly business executives. Again this Court reversed on the same ground as in *Ballard,* i.e., "in the exercise of our power of supervision over the administration of justice in the federal courts". (328 U.S. at 225).

However, this Court then made it quite clear in a subsequent decision, *Fay v. New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043, that *Ballard* and *Thiel* were not controlling in a *State Court case* where a defendant objects to exclusions from the jury where he is not a member of the excluded class. This Court stated in part:

> "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. Rawlins v. Georgia, 201 U.S. 638, 640, 50 L.Ed. 899, 900, 26 S.Ct. 560, 5 Ann. Cas. 783. Cf. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664. Relief has been held unavailable to a negro who objected that all white persons were purposely ex-

cluded from the grand jury that indicted him. Haraway v. State, 203 Ark. 912, 159 S.W. 2d 733.

Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment. These defendants rely heavily on arguments drawn from our decisions in Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S.Ct. 457; Thiel v. Southern P. Co. 328 U.S. 217, 90 L. Ed. 1181, 66 S.Ct. 984, 166 ALR 1412, and Ballard v. United States, 329 U.S. 187, ante, 1181, 67 S.Ct. 261. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. *They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and* these expressions of policy *are not necessarily embodied in the concept of due process."* (Italics supplied)

It should be noted that the case above cited referred to certain cases also cited by the Georgia Court of Appeals in the case of *Allen v. State,* supra, to-wit, *Glasser v. United States,* 315 U.S. 60; *Ballard v. United States,* 329 U.S. 187 and *Thiel v. Southern Pacific Company,* supra.

Decisions therefore by the United States Supreme Court based upon the duty of federal courts to supervise the selection of juries in the federal courts are not controlling upon irregularities in the selection of a grand jury in a State court where such irregularity does not violate due process to which the accused is entitled under the Fourteenth Amendment, *nor does it in any*

manner prejudice the accused on the trial of the case. It has been pointed out that there is a *material difference where irregularity is charged in connection with the establishment of the grand jury on the one hand,* or the trial jury on the other. In the case of *Charles v. Maxwell, Warden,* 348 F. 2d 890 (6 Cir.) there was a claim that the grand jury which indicted petitioner was not legally constituted. The court said in part:

> "There are no allegations in the petition that the persons selected by the judge were not qualified to sit on a grand jury, no claim that the appellant did not have a fair trial before the petit jury and no claim that the crime for which he was indicted was not an offense under the laws of Ohio. Neither is it alleged that the appellant was prejudiced in any way by the method of selecting the grand jury."

The court ruled:

> "We agree that the decision in this case may not be used by one accused or already convicted for the purpose of invalidating any indictment returned by a grand jury heretofore selected by a judge in the manner employed by the respondent."

The court added:

> "We find no violation of any constitutional right of the appellant."

In the *Allen* case, supra, the defendant was a white man. However, he was engaged in voter registration activities among Negroes when he assaulted an officer. He moved to quash the indictment and challenged the array of traverse jurors *before trial.* The Court of Appeals of Georgia reversed his conviction. No Negro *had ever been* called for jury service in the County. The Georgia Court of Appeals observed, however, "we can-

not say as a matter of law that this defendant, who was active in voter registration among Negroes, was not a member of a group systematically excluded in selecting grand and traverse jurors" (110 Ga. App. at 62). Thus, the identification of the defendant with Negroes obviously played a part in the *Allen* decision.

Rabinowitz, supra, involved a prosecution of a white girl convicted of perjury in the United States District Court for the Middle District of Georgia. She was a field worker for SNCC, a primarily Negro, civil rights group, and her alleged perjury grew out of her testimony before a federal grand jury concerning the organization's demonstrations and picketing of a store owned by a member of a federal petit jury which had returned a verdict against a Negro. After challenges before trial to the grand and petit juries, an *en banc* decision of the Fifth Circuit reversed, with two judges partially dissenting. However, in this appeal *no issue was raised* as to the appellant's standing to raise the question of jury composition (366 F.2d 37) and the majority opinion merely cited the *Ballard* case in a footnote.

Ballard also involved a *federal* jury and does not support Petitioner Strauss' position. The *Fay* decision, supra, of this Court expressly distinguishes between the power of this Court to regulate inferior federal courts through its supervisory power as to the composition of its jury panels where the appellant is not a member of the class excluded, and the reluctance of this Court to do so when the composition of a State court jury is challenged by a person not a member of the class excluded or discriminated against. We have been unable through exhaustive research to find any case in this Honorable Court which overrules the *Fay* case, supra, and insist that it still is

the law of the land with respect to the inability of a defendant to attack the exclusion from a jury of a class to which he does not belong, in a State Court proceeding.

Therefore, we respectfully insist that Petitioner, as a white man indicted in a non-racial case, with no showing of special prejudice against him, and no significant identification with Negro civil rights movements or demonstrations, completely lacks legal standing to challenge an alleged discrimination against Negroes on the State Court grand jury which indicted him.

SUMMARY OF ARGUMENT

We apologize for the unusual length of this Brief opposing a writ of certiorari, which are usually much shorter. However, because in two recent decisions of this Honorable Court in cases following the *Whitus* principle, i.e. *Anderson* and *Sullivan,* supra, this Court has granted certiorari and reversed decisions of the Supreme Court of Georgia *summarily and without a plenary hearing,* we wish to make our position completely clear on all issues in this extremely important case. We wish to accentuate the potential chaos that retroactive application of *Whitus* to collateral attack can bring to the judicial and penal system of this State.

In summary, we feel that this Court should decline to apply *Whitus* retroactively to a collateral attack by a white man in a non-racial case complaining of alleged disproportionate inclusion of Negroes on the grand jury which indicted him. Particularly is this so where no evidence was offered of any such discrimination against Negroes on the petit jury which convicted him. Petitioner has no standing to make such an attack in the cir-

cumstances of this case, where he has shown no special prejudice to him by the composition of said grand jury.

Further, we respectfully point out that retroactive application of *Whitus* in the instant case could have a disasterous effect upon the administration of criminal justice in Georgia. Thousands of convicted felons similarly situated as Petitioner could collaterally attack their indictments by Georgia grand juries, even where they were not prejudiced in the slightest by a disproportionately small number of Negroes on the respective grand juries which indicted them. Retrials after grants of new trials would be impossible in many instances, due to loss or other disposition of physical evidence, death or removal from the State of vital witnesses, lapse of memory of witnesses, and all the other disabilities usually suffered by prosecuting authorities caused by the lapse of time between commission of the crime and a retrial.

Finally, Georgia has repealed the law respecting the compilation of jury lists from segregated tax records, criticized in *Whitus,* and enacted a new law which eliminates any possibility of discrimination against Negroes serving on Georgia juries in the future. The new law is being rapidly implemented all over Georgia, and the evil criticized in *Whitus* can never occur again.

CONCLUSION

Petitioner Strauss richly deserved the fifteen year sentence imposed on him by the traverse jury, and we earnestly maintain that none of his constitutional rights were violated by the composition of this grand jury which he finally got around to attacking only after his direct appeal was dismissed.

Therefore, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY certified that three true and correct copies of the within and foregoing Respondent's Brief Opposing Petition for Writ of Certiorari, and Appendices which follow have been mailed by prepaid airmail to the law firm of Arthur B. Cunningham and Philip T. Weinstein, 812 Ainsley Building, Miami, Florida 33132, and three additional copies have been mailed to Attorney Harold Karp, 1317 William Oliver Building, Atlanta, Georgia 30303, counsel for Petitioner.

This.....day of April, 1968.

Of Counsel for Respondent